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Office of Administrative Law Judges
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Issue Date: 26 April 2006

CASE NO.: 2005-LHC-00105

OWCP NO.: 14-139816

In the Matter of:

TERRENCE R. WEBBER,
Claimant,

v.

WARTSILIA, U.S.A.,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.
Carrier

Appearances:

Terri L. Herring-Puz,
For the Claimant

Craig K. Connors,
For the Employer/Carrier

BEFORE: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). Claimant Terrence Webber ("Claimant") seeks compensation and medical benefits for a left shoulder injury he allegedly sustained as a result of a fall on May 9, 2003 in the course and scope of his employment as a diesel mechanic with Wartsilia, U.S.A., ("Employer") in Seattle, Washington. Such compensation would be in addition to the compensation and benefits Employer has already given Claimant for a scheduled

injury to his left upper arm resulting from the same fall, for which Claimant's entitlement to benefits was and remains undisputed.

It is undisputed that Claimant was involved in an accident at work that injured his left upper *arm*. Employer has paid to Claimant medical benefits, temporary total disability benefits from the time of injury up to the undisputed date of maximum medical improvement, and five percent permanent partial disability benefits for Claimant's left arm injury. Claimant has also secured alternative employment as an assistant service manager in a mechanic shop. The primary issues before me include whether Claimant also sustained a separate and distinct unscheduled injury to his left *shoulder*, and if so, whether the left shoulder injury has independently caused him to be permanently partially disabled, thereby entitling him to additional compensation.

At the formal hearing held on November 1, 2005 in Seattle, Washington, Claimant's Exhibits ("CX") 1 through 9 were admitted into evidence, as were Employer's Exhibits ("EX") 1-10. Hearing Transcript ("TR") at 1-15. Over Claimant's counsel's objection that the exhibit contained incompetent medical opinion testimony, I admitted Employer's Exhibit 6, consisting of correspondence between Employer's counsel and Dr. Becker, as going to the weight of the evidence, as it was relied upon by competent medical experts. TR at 7-9. I rejected Employer's Exhibit 11 as an untimely submission of vocational evidence. TR at 13. I permitted Employer to later submit the deposition testimony of Kent Shaefer, which I received on November 18, 2005, and have marked as Employer's Exhibit 12. I also admitted into evidence the pre-trial statements of both Complainant and Employer, which I marked as Administrative Law Judge Exhibits ("ALJX") 1 and 2, respectively. TR at 15-16.

All parties were represented by counsel, and at the close of the hearing the record was left open for the submission of post-trial briefs, which were filed both by Claimant and Employer and became part of the record on December 21, 2005, as Administrative Law Judge Exhibits 3 and 4, respectively.

STIPULATIONS

The parties have stipulated and I find that substantial evidence supports the following:

1) The Longshore and Harbor Workers' Compensation Act applies to this claim for compensation, medical benefits, attorney fees, and costs. TR at 17.

2) On May 9, 2003, Claimant suffered an industrial injury, arising out of and in the course of his employment with Employer. TR at 17-18.

3) On May 9, 2003, the date of the injury, an employment relationship existed between Claimant and Employer. RCB at 1.

4) On May 9, 2003, both Claimant and Employer became aware of the injury. TR at 17.

5) Claimant timely noticed and filed his claim, and has been receiving medical benefits. TR at 18.

6) The injury involved an avulsion to Claimant's left arm. TR at 18.

7) From May 10, 2003, through May 11, 2004, Claimant was entitled to and was paid a certain amount of temporary total disability benefits for the injury to his left arm. TR at 18.

8) On May 11, 2004, Claimant reached maximum medical improvement. TR at 18.

9) Claimant suffered a scheduled five-percent permanent partial disability injury to his left arm, and is entitled to and did receive from Employer an award for that injury. TR at 18.

10) On September 13, 2004, Claimant began working and continues to work to the time of hearing. TR at 18.

11) Claimant has no outstanding medical bills. TR at 18.

12) Claimant's average weekly wage just prior to his injury was calculated under Section 10(c) of the Act to be $1,375.10. TR at 18.

ISSUES FOR RESOLUTION

1. Did Claimant suffer an injury to his left shoulder, either as a result of his work-related accident of May 9, 2003, or as a result of the natural progression of the injury to his left arm which undisputedly resulted from the accident?

2. If so, did the left shoulder injury independently cause him to be permanently partially disabled within the meaning of Section 8(c)(21) of the Act by contributing to a loss in his wage earning capacity, independent of any such loss caused by his left arm injury?

3. If so, do Claimant's actual earnings from his present alternative employment reasonably and fairly represent his post-injury earning capacity?

4. Is Claimant entitled to costs and attorney's fees?

I. FINDINGS OF FACT

Claimant's Background and Pre-Injury Work History

Prior to his injury on May 9, 2003, Claimant had worked as a diesel mechanic since 1976. TR at 32. After graduating high school in 1975, Claimant spent four years in the United States Navy. TR at 28. While in the Navy, Claimant received vocational training and began to work as a diesel mechanic in 1976. TR at 28, 32. After Claimant left the Navy, he attended diesel

school at the Ohio Diesel Technical Institute in Cleveland, OH. TR at 28. Claimant is married and has no dependents. TR at 27-28. Claimant is left-handed. TR at 38.

Claimant's work as a diesel mechanic generally required him to work on a variety of engines. TR at 32. The engines ranged from relatively small passenger-car engines to power shift engines that could weigh up to five-hundred tons. TR at 32. The work required Claimant to lift heavy weight above his head and to lie in unnatural positions, such as on steel cooling pipes. TR at 32.

Claimant was required to lift and fit into place parts that could weigh 75-150 pounds up to 2,000 pounds or more, using tools and equipment ranging from hand tools, hydraulic tools, chain falls, and cranes, depending on the job. TR at 32-35. A "chain fall" consists of hand-linked chains that are used in conjunction with a trolley to install and remove engine parts. TR at 34. To operate the chain fall, Claimant had to pull on the chain, hand over hand, to lift, lower, remove, or position parts onto a trolley, which was used as a platform to position the parts in relation to the engines. TR at 34. The cranes were usually electric and button-operated, but Claimant had to manually strap and shackle the equipment he was moving to the crane. TR at 35. The equipment could be large and heavy, and included 2,000 pound cylinder heads, which at times Claimant had to crawl over, under, and/or around in order to attach it to the crane. TR at 35.

In August, 1995 Claimant began work as a factory technician and as an all-service technician at a Wartsilia plant in Indiana. TR at 29-30. As a factory technician, Claimant was responsible for building new engines in the factory. TR at 30. As an all-service technician, he would do similar work, but in offices and locations outside of the factory. TR at 30.

In 2000, Claimant was laid off by Wartsilia, Indiana due to the plant's closure. TR at 29-30.

After being laid off at Wartsilia, Claimant spent close to one year attempting to run a Snap-On Tool franchise in Evansville, Indiana. TR at 30-31. This job required Claimant to purchase a truck with a complete inventory of Snap-On tools, which he would drive from mechanic shop to mechanic shop, trying to sell mechanics Snap-On tools, tool boxes, warranties, and the like. TR at 30. The job was physically demanding, requiring Claimant to move all of the tools on the truck, in addition to tool boxes which could weigh up to 1,000 pounds empty. TR at 31.

In April or May, 2001, Claimant left the Snap-On Tools franchise due to a downturn in the local economy that greatly diminished Claimant customer's willingness and ability to invest in tools. TR at 31.

In 2001, Claimant began working for Employer Wartsilia, U.S.A. in Seattle, Washington ("Employer"). TR at 29-30. At the time of Claimant's injury on May 9, 2003, he was working for Employer as a service technician. TR at 28. Claimant's duties as a service technician required him to travel internationally to work on ship engines and power plant engines, which he would overhaul and/or conduct preventative maintenance. TR at 28-29.

Claimant testified that he has only received hands-on training, and never any management training. TR at 80. Prior to his injury, he had very little supervisory experience. TR at 51, 63. Claimant did do some supervisory work as a field supervisor, but it was not strictly supervisorial: he was also responsible for performing the tasks of the mechanics he was supervising. TR at 63, 82. He also worked as a lead technician, which was not a management position but required him to supervise employees as they built engines in the factory. TR at 63, 81. He also testified to running a power plant in Shelton, Washington for about six months. TR at 69-70.

Through his training and experience, Claimant has become familiar with a number of truck engines, including some engines from Caterpillar, Wartsilia, and with Employer's NOAB power plant engine blocks, which are twelve-feet tall or bigger. TR at 69.

Claimant testified that his job duties at Wartsilia, Indiana were as physically demanding as his job duties for Employer Wartsilia, Seattle. TR at 30.

The Alleged Injury

On May 9, 2003, Claimant sustained an injury to his left arm while working for Employer at the Coast Guard Piers in Seattle ("the injury"). TR at 17-18, 35. At the time, Claimant was working on a Coast Guard ice breaker ship, reassembling the engines after overhauling them and installing fuel pumps. TR at 36. The fuel pump installation required two people, Claimant and his co-worker, who was Claimant's supervisor of sorts. TR at 36-37. The two mechanics had to move the fuel pump into position, hook it to the chain fall, lift it approximately 15 or 16 feet, and move it to the cylinder where they were going to install the fuel pump using a trolley. TR at 36. Then, one mechanic would lower the chain fall while the other would physically push the fuel pump into position on the engine. TR at 36.

At the time of his injury, Claimant had already installed two fuel pumps and was moving the chain fall into position to retrieve a third fuel pump. TR at 36. Claimant was on the upper level of the ship when he slipped on the grading. TR at 36. Before falling ten feet to the steel deck plate below, Claimant was hung up by the armpit area of his left arm. TR at 36-37. Claimant testified that neither he nor his co-worker could say for certain what had caught Claimant's arm, but they supposed that it could have been a piece of angle iron to which a handrail was attached. TR at 37.

Claimant testified that for the split second that his arm was caught, his entire body weight came down on it, causing a jerk to his left arm and shoulder before his arm came loose and he fell to the ground, landing on his right side. TR at 36-37. His left arm went totally numb and was bleeding at the underarm. TR at 37. At the time, Claimant also believed that he had hurt or even fractured his right shoulder blade and right hip, given that he had landed on his right side. TR at 37.

Claimant stopped working for Employer after the fall and resulting injury. TR at 47.

Emergency Care

Immediately thereafter, Claimant and his supervising co-worker contacted the "corps man" on the Coast Guard ship, who had him taken to the ship's hospital. TR at 38. From there, they called Employer, after which an ambulance was called to take Claimant to University of Washington's Harborview Medical Center ("Harborview"). TR at 38. When Claimant arrived at Harborview, he was hurting from the neck down on his left arm and shoulder, and was sore in his right shoulder blade and right hip. TR at 38.

On May 9, 2003, Dr. Loren H. Engrav, M.D. was Claimant's attending physician at Harborview. TR at 38; CX 2 at 6-7; EX 1 at 6. Resident John Droesch, M.D. performed the surgery that day on Claimant's left arm under Dr. Engrav's supervision. *Id.* Claimant was diagnosed as having sustained a degloving avulsion injury ("avulsion injury") to his left upper arm, which extended approximately 27 centimeters, or two-thirds of the way down his arm from his axilla (armpit area). CX 2 at 6, 10; EX 1 at 6. An "avulsion injury" is an injury where the skin tears away from the arm, as opposed to a clean cut. Hanel Depo at 7; Kirby Depo. at 13. The doctors operated on the 27 centimeter avulsion injury, and then closed the lateral edges of the wound on both ends, leaving the middle 13 centimeters of the wound open in order to later perform a skin graft. TR at 38-39, CX 2 at 6, EX 1 at 6 and 134. No other injuries or complications were noted at the time. *See Id.* and CX 2 at 10.

Dr. C. Craig Blackmore, M.D., the attending radiologist, reviewed x-rays of Claimant's left shoulder, humerus, hand, scapula, and cervical spine. EX 1 at 1-5. Dr. Blackmore agreed that there was no fracture or subluxation or gross soft tissue abnormalities in the left shoulder. EX 1 at 1-2, 4. In a Final Report dated April 19, 2004, Dr. Parisi (*see* text under heading "Dr. Hanel and the Department of Orthopedics" below) noted that the x-rays demonstrated a type 2 or 3 acromion. CX 2 at 37; EX 1 at 14.

Skin Graft Surgery

On May 15, 2003, Claimant underwent skin graft surgery at Harborview. TR at 39; CX 2 at 8; EX 1 at 6. Dr. Engrav was again the attending surgeon, with Joseph Lynch, M.D., and Kimberly K. Lu, M.D. also present. CX 2 at 8. The doctors removed a four-by-ten inch piece of skin from Claimant's left leg, known as the "donor area," which they then grafted to the degloved avulsion area of the armpit area of Claimant's left arm. TR at 39; CX 2 at 8-9, EX 1 at 6. Claimant was then immobilized with his left arm extended, straight out, at a ninety degree angle to his body, and remained in that position for several days. TR at 39; EX 1 at 6. No complications were noted at the time. CX 2 at 10.

Discharge and Post-Discharge

On May 21, 2003, Claimant was discharged from Harborview. TR at 39-40; CX 2 at 10-11; EX 1 at 6. He was in stable condition and on a regular diet. CX 2 at 11; EX 1 at 6-7. Claimant was instructed to decrease the level of activity with his left arm, keep it in gauze as directed, continue dressing changes to his donor site as directed, and to follow up with Dr.

Engrav in the Burn/Plastic Surgery Clinic in one week. CX 2 at 11; EX 1 at 6-7. He was prescribed a number of medications. *Id.*

At the time of his discharge, Claimant testified that his left arm and left shoulder still caused him pain, and a large bruise remained on his right hip. TR at 40. Claimant's right hip eventually healed and he experienced no further problems with it, and his right shoulder gave him no further problems. TR at 40, 83.

Claimant also testified that at the time of his discharge, the skin graft on his left arm was "very, very sore." TR at 40. Claimant also experienced soreness through his "bicep tendon on the inside of the elbow" and through his left shoulder. TR at 40. He felt pain in his shoulder when he moved his arm, and noticed that he could not sleep on his left shoulder. TR at 40. Claimant still cannot sleep on his left shoulder. TR at 40.

Early Physical Therapy

On May 30, 2003, Claimant began physical therapy at Puyallup Valley Physical Therapy & Sports Rehabilitation, as recommended by Dr. Engrav. TR at 41; CX 3 at 49-62. Jeff Billingsley, M.P.T., conducted the initial evaluation. CX 3 at 49. He found that Claimant's left shoulder flexion was twenty degrees less than in his right shoulder, and his left shoulder external rotation was five degrees less than his right shoulder. *Id.* He treated Claimant with ultrasound and exercises designed to improve strength and range of motion in Claimant's arm and shoulder, and instructed Claimant to come in three times a week for continued physical therapy. *Id.*

The physical therapy consisted of stretching, coupled with "electro-shock" therapy that concentrated on Claimant's left bicep, tricep, shoulder, and lower neck area. TR at 41, 83-84; CX 3 at 50-62. The treatment required him to lift weights with his biceps, triceps, overhead, and pulling down in front of his body. TR at 46; CX 3 at 50-62. Claimant testified that his goal through physical therapy was to return to work as a diesel mechanic, which he had done for most of his life. TR at 46. Claimant attended the sessions regularly until October 6, 2003, and appeared motivated to return to work. CX 3 at 50-57.

Claimant testified that his left shoulder hurt as soon as he began physical therapy. TR at 42. However, he and his physical therapist assumed that the pain was normal, given the severity of the fall and the fact that Claimant had not used the arm in quite some time. TR at 42. They assumed the pain would eventually subside. TR at 42.

Treatment by Dr. Hanel and the Department of Orthopedics

Dr. Douglas P. Hanel, M.D., a Professor of Hand and Microvascular Surgery in the Department of Orthopedics and Sports Medicine at the University of Washington ("Dr. Hanel's office"), was Claimant's primary treating physician. CX 2 at 20; EX 1 at 10; Hanel Depo. at 4. His academic position requires him to teach residents or physicians in training, to perform research, to care for up to seventy outpatients a week, and to perform seven to ten operative procedures per week. Hanel Depo. at 4. In the course of his practice, he has treated individuals who have suffered on-the-job injuries to their upper extremities. Hanel Depo. at 4-5.

On November 17, 2003, Claimant made his first visit to Dr. Hanel at Dr. Engrav's referral. TR at 42; CX 2 at 19; EX 1 at 10; Hanel Depo. at 5. Claimant complained of pain in his left bicep, tendon, and shoulder at a level of eight on a scale of ten while working, and at a level of four to five on a scale of ten when not working. TR at 42; CX 2 at 22-23. The front part of his left shoulder had started to "pop" and feel weird, and continued to "pop" up to the time of the hearing. TR at 43; CX 2 at 33.

That day, Dr. Hanel conducted a physical examination and issued a preliminary report. CX 2 at 19; EX 1 at 9; Hanel Depo. at 8. Dr. Hanel reported that Claimant had completely normal range of motion in his left forearm, wrist, and digits, but had an abnormal range of motion in his left shoulder, which caused him pain with forward flexion, abduction, and external rotation. *Id*. He also noted that Claimant experienced pain along the anterior left shoulder with forward flexion, which radiated down to the avulsion injury in his axilla (armpit) and upper arm. *Id.* Dr. Hanel reported that Claimant's left shoulder joint was stable, and noted the absence of crepitus (a crackling or grating sensation under the skin). *Id.*

In his preliminary report of November 17, 2003, Dr. Hanel concluded that, in addition to a skin avulsion, it was also likely that Claimant tore or ruptured his biceps muscle belly, which, like the biceps tendon, was in stable condition. CX 2 at 19-20; EX 1 at 9-10; Hanel Depo. at 8-9. The "biceps muscle belly" is the bulky muscle in the upper arm between the shoulder and the forearm. Hanel Depo. at 9-10. The "biceps tendons" connect the biceps muscle belly at the shoulder and elbow. *Id.* The biceps tendon of origin is at the shoulder, which is a part of the shoulder anatomy. *Id.*

Dr. Hanel recommended aggressive stretching and strengthening of the shoulder, forearm, elbow, wrist, and digits of both arms, specifically looking to strengthen the shoulder girdle and biceps tendon. *Id.*. Dr. Hanel suggested that with aggressive therapy and a willingness to work though the pain, Claimant's left-arm strength would equal that of his right arm in three to four months, thereby enabling Claimant to return to work. *Id.*; TR at 43. Dr. Hanel addressed Claimant's concerns that his biceps tendon would rupture by informing him that although his occupation is predisposed to biceps tendon ruptures, his left arm was no more predisposed to bicep tendon rupture than his right. *Id*. Dr. Hanel returned Claimant to Dr. Engrav with his recommendations. *Id.*

On March 8, 2004, Claimant returned to Dr. Hanel for a follow-up examination. TR at 44; CX 2 at 31; EX 1 at 12. Dr. Cassandra Robertson, M.D., who was a Fellow in the Department of Orthopedics, participated in the examination and prepared the report. CX 2 at 31; EX 1 at 12. Claimant complained of left shoulder and arm pain interfering with his sleep and other functions. *Id*. Upon objective physical examination, Dr. Hanel found that Claimant suffered a painful range of motion of the left shoulder, though the range of motion remained fairly full. *Id.* He found no palpable crepitus, or creaking of the shoulder, and no evidence of parascapular wasting, which refers to problems where muscles attach to the shoulder girdle. *Id.* and Hanel Depo. at 13. He noted a palpable defect and tenderness over Claimant's supraspinatus, which caused him significant discomfort when specifically tested. *Id.* The supraspinatus refers to the top muscle and tendon in the rotator cuff, and a "palpable defect" means a defect perceptible to

touch, such as where the doctor can feel a hole, dent, or divot in it, but a palpable defect does not necessarily indicate abnormality. Hanel Depo. at 13; Kirby Depo. at 26. Dr. Hanel also noted that there was a positive impingement sign, meaning that as Claimant brings his shoulder forward, he reaches a point where it appears that the shoulder colliding with the scapula or the shoulder blade would be painful. CX 2 at 31; EX 1 at 12; Hanel Depo. at 13.

In the final report of March 8, 2004, Dr. Hanel's and Dr. Roberton's assessment was that Claimant suffered from rotator tendinopathy, meaning tearing and/or other problems with the tendons in the group of muscles around the shoulder, and likely experienced a tear. CX 2 at 31; EX 1 at 12; Hanel Depo. at 14. The doctors ordered an MRI in order to visualize that assessment. *Id.* The doctors suggested that if the MRI revealed a partial thickness tear, steroid injections and therapy may settle it down, and if it revealed a full thickness tear, Dr. Hanel would offer Claimant surgical intervention. *Id.*

On April 19, 2004, Claimant returned to the Department of Orthopedics for a number of MRI's of his left shoulder. CX 2 at 35-37; EX 1 at 14-20. Dr. Thurman Gillespy III, M.D. performed the MRI's with the assistance of radiologist Dr. Dhawal Goradia, M.D. *Id.* The MRI's revealed small cysts in the left shoulder at the insertion of the rotator cuff, but no evidence of a tear. *Id.* The doctors also found a mild impingement of the supraspinatus tendon by subacromial osteophyte in the subacromial arch/AC joint of the collarbone. *Id.*; Kirby Depo. at 29. Other findings were normal. CX 2 at 35-37; EX 1 at 14-20. Dr. Hanel confirmed that the MRI did not reveal a rotator cuff tear. Hanel Depo at 15. It was Claimant's understanding that the MRI did not show that Claimant had a torn rotator cuff, but did show that the tendons in his shoulder were not working correctly. TR at 45.

Later on April 29, 2004, Dr. Debra M. Parisi, M.D., physically examined Claimant, reviewed his MRI results, and issued a Final Report. CX 2 at 37-38; EX 1 at 14-15. Claimant informed Dr. Parisi that he was unable to complete the aggressive physical therapy ordered by Dr. Hanel due to exquisite left shoulder pain, which Claimant had felt since the accident, but worsened significantly in October, 2003 as a result of the aggressive therapy. *Id.* Claimant continued to complain that the pain in his shoulder interfered with his sleep and other functions, and again demonstrated a lateral impingement sign when asked to reproduce the pain. *Id.*

In her physical examination, Dr. Parisi noted that Claimant's left shoulder had a painful range of motion, but the range of motion was nearly symmetrical to his right side. CX 2 at 37-38; EX 1 at 14-15. She found no palpable crepitus or evidence of atrophy. *Id.* Dr. Parisi found tenderness over the acromioclavicular joint and with palpation of the bicipital groove, but it did not reproduce Claimant's symptoms. *Id.* She found that Claimant had a positive impingement sign under both Neer and Hawkins tests. *Id.*

Dr. Parisi reviewed the x-rays of Claimant's initial injury taken on May 9, 2003, which demonstrated a type two or type three acromion, or bony prominence. CX 2 at 37-38; EX 1 at 14-15; Hanel Depo. at 16. The MRI arthogram taken earlier on April 29, 2004 revealed thickening of the supraspinatus tendon, but no evidence of a rotator cuff tear. *Id.* Dr. Parisi's assessment based on both her physical examination and her diagnostic studies was that Claimant suffered a left subacromial, or rotator cuff, impingement. *Id.* Subacromial impingement means

irritation of the soft tissues around the rotator cuff as they pass through the subacromial space. Hanel Depo. at 17. Dr. Hanel testified by deposition that most shoulder surgeons, including his boss and partner Dr. Rick Matsen, do not believe in the subacromial impingement diagnosis, believing it just wear and tear. *Id.* Dr. Parisi suggested that in order to achieve the goal of returning Claimant to work, his left shoulder pain must be improved so that he could continue physical therapy on his distal biceps. CX 2 at 37-38; EX 1 at 14-15. Dr. Parisi noted that if Claimant shows relief of his impingement symptoms, he could proceed with aggressive physical therapy to rehabilitate his left distal biceps. *Id.*

That same day, Claimant was given a steroid injection in the subacromial space of his left shoulder, which is the space between the shoulder blade and collarbone, and was asked to report back in six to eight weeks. CX 2 at 37-38; EX 1 at 14-15; Hanel Depo. at 16. The steroid injection helped with the pain for an hour or two. TR at 45-46.

On June 7, 2004, Dr. Hanel issued a final report, in which he noted there was no need for him to continue to see Claimant. CX 2 at 40; EX 1 at 21. He noted that since he last saw Claimant, Claimant had undergone a physical capacity evaluation under the direction of Dr. Becker (*see* section under heading "Dr. Becker and Claimant's Physical Capacity Evaluation" below). *Id.* Dr. Hanel stated that, based on Dr. Becker's evaluation, the doctors should be able to generate recommendations for return to work duties. *Id.* Claimant had also undergone an independent medical examination under the direction of Dr. Kirby (*see* section under heading "Dr. Kirby's Independent Medical Examination" below). *Id.* Dr. Hanel noted that Dr. Kirby was in agreement with his assessment that although there was pain about Claimant's left shoulder, it was stable, there was nothing mechanically that should or could be done about it, and operative intervention was unnecessary. *Id.* Claimant was informed that surgery could not repair that kind of damage. TR at 45. Dr. Hanel instructed that Claimant follow through with the recommendations of Dr. Becker, Dr. Kirby, and his vocational rehabilitation counselors. CX 2 at 40; EX 1 at 21.

On January 24, 2005, Claimant returned to Harborview complaining of continued shoulder pain and of a red streak that would appear on his left arm with exertion. CX 2 at 42-43. He was physically examined by Dr. Hanel and Thomas Nicandri, M.D., a resident in the Surgery Department. *Id.* Their physical examination revealed a subacromial impingement of the left shoulder, a palpable tendon snap, which refers to a perceptible feeling of the tendon going "clunk, clunk," and a thickened biceps tendon, which refers to scarring that occurred as a result of the healing process of the avulsion injury. *Id.* and Hanel Depo. at 20. The doctors noted in their report and Dr. Hanel confirmed in his deposition that it was unlikely that any surgical options would relieve his pain, and instructed Claimant to continue active range of motion as tolerated. *Id.* They suggested he return for evaluation the next time the red streak appeared, which they were unable to diagnose without seeing. *Id.*

Claimant testified that he was happy with Dr. Hanel's treatment and satisfied with him as a doctor. TR at 75.

The parties have stipulated that On May 11, 2004, Claimant reached maximum medical improvement. TR at 18.

Work Hardening and Aggressive Physical Therapy

On or around October 8, 2003, Claimant moved from physical therapy into a more aggressive "work hardening" program, coupled with physical therapy, with Capen Industrial Rehabilitation Services ("Capen"). TR at 41; CX 2 at 19; EX 1 at 9. The purpose was to elevate Claimant's tolerances to the heavy work category so that he could return to work. *Id.* Christina Casady, OTR/L, M. Ed., conducted the initial work hardening evaluation. CX 4 at 63-65. She found that Claimant had strength and endurance limitations to the left upper arm, and that by lifting twenty-eight pounds from the floor to overhead, he demonstrated physical demand levels for between light and medium tolerances. *Id.*

Capen put Claimant on a plan to perform physical and occupational therapy five times a week, starting with two to four hours per day the first week and building up to six to eight hours a day by the sixth week. CX 4 at 63-65. The work hardening program focused on Claimant's biceps, triceps, and shoulder muscles, and involved graduated weight handling, work simulation, and instruction in functional body mechanics and posture. TR at 41; CX 4 at 63-65.

He continued to receive positive evaluations and progress reports from Capen, which noted Claimant's high motivation and continued improvement in strength in his left arm and shoulder. *See* CX 4 at 70-83. However, in his evaluations Claimant continued to complain of pain in his left shoulder and rotator cuff, which worsened as the treatment intensified and resulted in decreased mobility in the left shoulder. *Id.*

Claimant testified that the first time he complained to his doctors of pain in his left shoulder was after he started the more aggressive therapy. TR at 44, 82. He testified that the pain in his shoulder had worsened, and was "totally different" from the pain in his arm at the skin graft. TR at 44. The skin graft felt "funny," he felt numbness on the inside of his arm, and the tendon would inflame. TR at 44. Claimant's shoulder, on the other hand, felt like "someone [wa]s taking . . . an ice pick and going in from the front of my shoulder, trying to push back through." TR at 44.

On February 23, 2004, Claimant was discharged from the work hardening program, based on Capen's determination that he had reached maximum tolerances. CX 4 at 81-82. He could frequently handle sixty to ninety pounds, and demonstrated the physical demand level for very heavy work. *Id.* He complained of symptoms in the left biceps tendon, which Capen believed did not interfere with his activities. *Id.* At the time of discharge, Claimant continued to report symptoms in his left shoulder with abduction, which had escalated as a result of the increases in the amount of weight he was lifting. *Id.*

Following his discharge from the work hardening program, Claimant continued to receive physical therapy from Capen. *See* CX 4 at 83-86. On May 4, 2004, he complained of pain and loss of functional range of motion in his left shoulder. CX at 83. His left shoulder pain was at a level of three out of ten when resting, but would sharpen to over five out of ten when doing shoulder flexion and abduction exercises. *Id.* His treating physical therapist noted tenderness and

popping in Claimant's left shoulder, and believed most of Claimant's symptoms followed those of a rotator cuff injury. CX 4 at 83-84.

On May 21, 2004, Claimant's nurse case manager ("case manager") telephoned Capen, and instructed Capen to discontinue providing physical therapy to Claimant. CX 4 at 85-86; TR at 47, 81. The case manager mentioned to the physical therapist that Claimant's distal biceps pain was the main emphasis of the treatment. *Id.* The physical therapist noted that the distal biceps pain had been addressed with great success earlier in the year, and that Claimant's physical therapy over the prior two weeks had focused on the lack of range of motion, popping and grinding, and secondary pain in Claimant's left shoulder. *Id.*

Claimant stopped receiving physical therapy on May 21, 2004. CX 4 at 85-86; TR at 61. The physical therapist noted that Claimant was surprised and upset that his rehabilitation had been cancelled without notice. CX 4 at 86. Claimant testified that the "nurse case manager" had never seen him. TR at 47. Claimant believes the treatment would have continued had it not been cancelled by his insurance carrier. TR at 81. The physical therapists encouraged Claimant to continue using the Capen gym at no charge to increase his strength and ability to meet his job load demands. CX 4 at 86.

During the time of his physical therapy and work hardening, Claimant made follow-up visits to the plastic surgery clinic at Harborview to ensure that the skin graft and donor area were healing correctly. TR at 41-42. The graft and donor area healed fairly smoothly, but Claimant's left shoulder continued to cause him pain. TR at 42.

Dr. Kirby's Independent Medical Examination

On May 11, 2004, Claimant underwent an independent medical examination by Dr. Richard Murray Kirby, M.D. ("Dr. Kirby"), an orthopedic surgeon with a subspecialty in shoulder surgery, who dedicates a small percentage of his practice to conducting independent medical evaluations. Kirby Depo. at 4, 7, 9. In the course of the examination, Dr. Kirby obtained Claimant's background and the history of his injury, and reviewed the x-rays and medical reports from Harborview, which he found were consistent with his own findings. EX 4 at 28-30; Kirby Depo. at 10-19, 23-31.

Dr. Kirby also physically examined Claimant. EX 4 at 28-30; Kirby Depo. at 12-15. He found numbness at the skin graft on Claimant's upper left arm, a partially ruptured triceps, evidence of a torn or avulsed biceps tendon, and tenderness at the lateral subacromial area of Claimant's left shoulder. *Id.* Dr. Kirby found that Claimant had full range of motion in his left shoulder, but noted that Claimant felt pain when he reached up and also when he reached behind his back with his left arm. *Id.* Dr. Kirby tested Claimant's shoulder strength and found "give-away weakness" in all directions, meaning that Claimant would start to resist, and then let his muscles relax. Kirby Depo. at 14-15. According to Dr. Kirby, "give-away weakness" is a distracting finding that has no association with any specific injury, "is often associated with an amplification of symptoms," and "usually is not a good sign in terms of the predictability of the exam being accurate." *Id.* at 15.

Dr. Kirby did not identify any objective findings that would indicate a permanent shoulder injury. Kirby Depo at 15. Dr. Kirby stated that a diagnosis of impingement requires both subjective and objective findings, which, when combined together like bits of a puzzle, may add up to a consolidated diagnosis of impingement. *Id.* at 18. He found that Claimant's complaints of pain when Dr. Kirby pushed on an area of the rotator cuff were consistent with impingement, but none of the objective tests he performed indicated shoulder impingement. *Id.* at 18. He did not see any indication of shoulder atrophy when comparing Claimant's shoulders, nor any wasting of the left shoulder's musculature. *Id.* at 18-19. Dr. Kirby did not find any indication of specific, objective findings of shoulder injuries in reviewing Claimant's medical records from Harborview. *Id.* at 19.

Dr. Kirby's impressions were that Claimant had continued pain in the left shoulder area with mild symptoms and findings of rotator cuff impingement, but the exam was a bit equivocal due to Claimant's "give away weakness" described above. EX 4 at 28-30; Kirby Depo. at 19. The left shoulder MRIs appeared normal. *Id.* Dr. Kirby believed that there had probably been a strain to Claimant's rotator cuff with the fall, but found no objective evidence of measurable physical or mechanical impairment to the left shoulder. Kirby Depo. at 20. He did find that Claimant had very significant impairment from the left arm avulsion injury. *Id.*

Dr. Kirby recommended that Claimant undergo a physical capacity examination. Kirby Depo. at 40-41.

Dr. Becker and Claimant's Physical Capacity Evaluation

On June 3, 2004, Claimant, accompanied by his wife, was given a "Performance Based Physical Capacity Evaluation" by Theodore Becker, Ph.D., RPT, ATC CER, CDE, CEAS, CDA, a Human Performance Specialist, Certified Senior Disability Analyst and Diplomate of the American Board of Disability Analysts, and a Diplomate of the American College of Forensic Examiners. TR at 47; EX 5 at 33-101. In conducting the evaluation, Dr. Becker used both subjective and objective information. *Id.* He obtained Claimant's background and history, his subjective complaints describing the results of the injury, his discomfort, any increasing and decreasing symptoms, and any medications he had taken. EX 5 at 33-37. Dr. Becker also obtained Claimant's subjective functional levels, including daily activity, self care, household chores, yard work, vehicle maintenance, shopping, recreation, exercise, and occupational endeavors. EX 5 at 37-38.

Dr. Becker also obtained objective data from Claimant by conducting a series of strength, mobility, biomechanical function, and tolerance tests, in which he observed and photographed Claimant engaging in a variety of activities, such as lifting and manipulating various weights from the floor and overhead. EX 5 at 39-46, 51-100. In a section of the evaluation report entitled "Other Observations," Dr. Becker noted that, biomechanically, there was a restrictive mechanism in Claimant's left shoulder to elevation and abduction, and there is a restriction about the left forearm at the axis of the elbow. EX 5 at 46. He also noted the existence of intrinsic elevation restrictions in the left shoulder for full to overhead intact mechanics, and that strength testing in the shoulder range and below was within the "medium" range of work, while in the shoulder

range and above testing was within the "light to medium" range of work. EX 5 at 45; CX 6 at 104.

He noted that Claimant was polite and cooperative, and completed all tasks as required. *Id.*

Claimant testified that he tried his hardest in the evaluation because he loved his job as a diesel mechanic, and that his goal was to return to the work he had done for most of his life. TR at 46-47. Hard data confirmed that Claimant had given maximum effort in testing. EX 5 at 46. He hoped Dr. Becker would conclude that he was physically capable of returning to his job. TR at 47. Following the evaluation, it was Claimant's understanding that he was not capable of returning to work. TR at 47. Dr. Becker informed him that he would never be a diesel mechanic again. TR at 47.

Claimant's Opinion about His Physical Limitations

Claimant testified that prior to the injury, he had not been treated by a physician for any symptoms in his left arm and shoulder, and had no physical limitations with respect to his job duties. TR at 56. Claimant testified as to his understanding of the specific duties of a diesel mechanic that he was no longer capable of performing as a result of the injury to his left arm and shoulder. TR at 48. These duties included: (1) removing and installing truck starters, (2) removing truck tires, (3) overhead work with items weighing over four pounds more than briefly, (4) lifting heavy weights with his left arm straight out from his body, (5) working in odd positions around large equipment, (6) working a manual chainfall (Claimant testified that he could use an electric chainfall, but that he used a manual chainfall 99.9% of the time he worked for Employer), (7) attaching large straps from a crane to heavy equipment, and (8) lifting anything weighing more than 30-35 pounds. TR at 48. Claimant testified that he has tried to lift items weighing more than 30-35 pounds, but his left arm and shoulder do not permit it. TR at 48-49.

At the hearing, Claimant was asked about which specific diesel mechanic duties he believed he could not perform solely because of his shoulder injury, without considering the arm avulsion injury. TR at 57-59. Claimant responded "all of it, pretty much," noting that it requires a lot of physical labor, lifting heavy weights, and putting one's body in awkward positions. TR at 59. Claimant specifically mentioned installing clutches and starters into trucks. TR at 59. Starter installation requires the mechanic to place his hands over his head in order to manipulate the 85 pound starter into position, hold it in position, an bolt it to the truck. TR at 59.

Claimant was also interested in the position of power plant manager. TR at 51, 69. He testified that his ability to do the job after the injury would depend on the particular job description. TR at 69. He did not believe he could fulfill the power plant manager's job duties if they were similar to the duties he had while running the plant for six months in Shelton, Washington, because it involved a lot of physical labor and required him to be on-call 24 hours a day, seven days a week. TR at 70.

Claimant testified that he could probably operate a forklift on concrete, but that he probably could not operate a forklift on gravel, because the bouncing of the forklift would bother his shoulder. TR at 71.

He is physically able to perform his current job as Assistant Service Manager, but lives with pain in his left shoulder every day. TR at 70.

At hearing, Claimant was asked about what non-work related activities he could no longer do solely because of his shoulder pain. TR at 59-60. He could no longer hunt, because being left-handed, his left shoulder would absorb the recoil of a shotgun or high-powered rifle, which would cause him pain. TR at 60. He attempted fishing, but casting the fishing reel caused pain in his left shoulder. TR at 60. Walking or hiking aggravates the pain he feels in his left shoulder due to the natural swing of his arms, which he compensates for by hooking his left thumb to his pocket or belt loop for stability. TR at 61.

Dr. Hanel's Medical Opinion

Dr. Hanel opined that, in addition to and separate from the upper arm avulsion injury, Claimant's shoulder was also injured by his fall. Hanel Depo. at 23. He believed that Claimant's left shoulder was "wrenched," twisted, or torqued at the time of the fall, and that the force and velocity of the fall was sufficient to cause injury to or account for the symptoms of Claimant's left shoulder. Hanel Depo. at 10-11, 24. He believed that the avulsion injury to Claimant's upper arm did not cause Claimant's shoulder problems. *Id.* Rather, he believed that they were two separate injuries that occurred at the same time. *Id.* at 23. Even if the fall did not directly injure Claimant's shoulder, opined Dr. Hanel, the immobilization and treatment of the left shoulder caused the pain and stiffness about which Claimant complained. *Id* at 23-24.

When asked whether he believed that the cause of Claimant's disability, limitations, and work restrictions was his shoulder problem, as opposed to the avulsion injury of the upper arm, Dr. Hanel stated, "you have to ask Dr. Becker that one. I mean, you really do. Because it's the whole global issue. But—and I would—you do have to refer that to Dr. Becker." Hanel Depo. at 30, 32.

Dr. Becker's Biomechanical Opinion

Based on Claimant's Physical Capacity Evaluation, Dr. Becker came up with a number of conclusions and recommendations. EX 5 at 46-47. Claimant had a generalized strength restriction in the proximal and distal sections of his left upper extremity. EX 5 at 47. With respect to Claimant's shoulder, he found that "[e]levation for glenohumeral 'snubbing' shows a restriction of the position in the left shoulder, as identified in figure 2B. The 'depth' of the glenohumeral superficial skin dimple reveals that the mechanism of rotation and elevation at the left shoulder has restricted internal biomechanics." *Id.* at 44. This finding is not explained, and when asked on cross-examination what he thought Dr. Becker meant, Dr. Kirby had no idea. Kirby Depo. at 43. In Dr. Becker's opinion, limitations in Claimant's left upper extremity would be prohibitive for the physical demands of mechanical work. *Id.* However, Dr. Becker opined, Claimant would be able to return to various aspects of his previous job as a Snap-On tool dealer.

Id. Dr. Becker believed that, based on his limitations, Claimant could perform full-time work in the general category of "medium work," as defined by the Dictionary of Occupational Titles. *Id.*

Between March 24, 2005 and October 3, 2005, Employer's counsel exchanged correspondence with Dr. Becker regarding his physical capacity evaluation report of Claimant. EX 6 at 102-103(a).[1] In that correspondence, Dr. Becker confirms his opinion that Claimant's left arm is the specific locus of the injury causing any dysfunction in Claimant's left shoulder, including difficulties with overhead use and impingement, and that there is no distinct injury with a locus in the left shoulder causing its dysfunction. EX 6 at 102-103. When asked to clarify whether Dr. Becker believed that the positive shoulder impingement sign noted by medical doctors who had examined Claimant was "more probably than not caused by an injury with a locus in the arm[,] or in the shoulder," Dr. Becker opined that "the secondary effect of the [left arm] injury is dysfunction in the biomechanics of the [left] shoulder which has created a profile of clinical impingement." EX 6 at 103(a)(both of them).

Dr. Kirby's Medical Opinion

On May 25, 2004, Dr. Kirby signed his concurrence to a note likely written by Claimant's nurse case manager to clarify his conclusions of the examination. Kirby Depo. at 32 and Exhibit 4. Dr. Kirby concluded that Claimant could return to the "job of injury" with a fifty pound lifting restriction, that he should discontinue physical therapy and work hardening which Dr. Kirby believed caused more aggravation than benefit, that Claimant had reached maximum medical improvement as of May 11, 2004, and that he had suffered a five percent impairment of the upper extremity. *Id.* at 32-34 and Exhibit 4. Dr. Kirby stated that the fifty pound lifting restriction was related to an injury stemming from the left arm, not the left shoulder. *Id.* at 41.

Dr. Kirby reviewed Dr. Hanel's records and deposition, and agreed that some harm probably occurred to Claimant's shoulder as a result of the fall. He agreed with Dr. Hanel that Claimant's left shoulder was symptomatic and painful, but did not believe it was reasonable to expect that the pain would cause some restricted range of motion in the shoulder. *Id.* at 39-40. Dr. Kirby stated that he would not impose any work restrictions or functional limitations on Claimant with respect to his left shoulder. *Id.* at 42.

Dr. Kirby acknowledged that there could be some strength deficit between Claimant's right and left shoulder. Kirby Depo. at 39-40. Based on his review of Dr. Becker's physical capacity examination, he acknowledged that Dr. Becker found left shoulder restrictions and limitations on Claimant that were consistent with the symptomatic shoulder observed by both Dr. Hanel and by Dr. Kirby himself. *Id.* at 41.

Impairment Ratings

By letter dated July 27, 2004, Dr. Kirby confirmed that he had not identified a specific or ratable impairment of Claimant's shoulder, but did have a five percent impairment of his upper left arm below the shoulder. Kirby Depo. at 32-34 and Exhibit 4.

[1] A letter from Employer's counsel and a return letter in response from Dr. Becker are both numbered 103(a)).

In calculating the five percent impairment rating of Claimant's upper left arm, Dr. Kirby relied on the Fourth and Fifth Edition American Medical Association Guides for the Evaluation of Permanent Impairment ("AMA Guides"). Kirby Depo. at 34-35. Dr. Kirby testified to being quite good at rating shoulders, but wasn't so sure about areas of skin loss and grafts. *Id.* Based on his experience rating shoulders and on the amount of disability Claimant had, Dr. Kirby felt the five percent rating was appropriate. *Id.*

In determining that there was no ratable impairment of the shoulder itself, Dr. Kirby pointed to the absence of objective findings of impairment from the physical examination, x-rays, and MRI's, which are necessary to merit an impairment rating. Kirby Depo. at 35.

Dr. Hanel reviewed Dr. Kirby's reports, and, referring to the AMA Guides, agreed with Dr. Kirby's impairment assessments. Hanel Depo. at 31.

Claimant's Efforts to Find Alternate Employment

After it became clear to Claimant that he could no longer work as a diesel mechanic, he contacted Employer about continuing his employment with them. TR at 49. Employer told Claimant his services were no longer needed because he could not lift 125 pounds, as his job required. TR at 49.

Claimant's local OWCP assigned him a vocational rehabilitation counselor named Courtney Sweeney ("Vocational Counselor"). TR at 49-50. She sent Claimant to a number of resume-writing and job-search classes, which he attended and used to update his resume and search for jobs. TR at 50. He also took an "interest inventory test." TR at 50.

Claimant looked for work, both personally and through personal contacts, in Indiana, where he has family, Colorado, where he owns property, and Alaska. TR at 50-51. Claimant answered a number of classified job postings and electronically filled out on-line applications. TR at 50. He searched for supervisory positions at diesel-fired and natural gas-fired power plants and at truck shops. TR at 51. Many of these positions require one or more years of managerial experience. TR at 77.

Claimant has indicated a willingness to relocate on his resume. TR at 76-77.

Claimant's Current Position

On September 13, 2004, Claimant obtained work as an "Assistant Service Manager" for Western Peterbilt, a mechanic service shop that services private and commercial over-the-road trucks. TR at 51, 54. Claimant learned of a position at Western Peterbilt through his vocational counselor, who at the time said it was for the position of "service writer." TR at 71-72. He hand-delivered his resume to the company, had an interview around September 7, 2004 and received an offer two days later. TR at 71-72. He works the swing shift, though he worked a different shift in his former position with Employer. TR at 52.

His duties as an Assistant Service Manager include conducting customer intakes, finding out what mechanical problems they have with their trucks, documenting their problems, entering the data into a computer, assigning mechanics to fix the problems, and helping mechanics troubleshoot when they have difficulties fixing a truck. TR at 51-52. The job requires a lot of walking and the ability to use a computer, but does not require much physical exertion. TR at 52. Claimant does not fix the engines himself, but the work utilizes his extensive experience as a diesel mechanic. TR at 52-53. He works with the mechanics to determine which parts are necessary to complete repairs. TR at 64.

As an Assistant Service Manager, Claimant manages and supervises around fourteen mechanics. TR at 52, 62-63. He has gained some additional managerial experience through the position, and has become familiar with warranty issues. TR at 64. He does not have authority to hire or fire, but can make recommendations to the service manager. TR at 80-81.

He is physically able to do his job as Assistant Service Manager, but has shoulder pain every day which he simply must live with. TR at 70.

Claimant's Current Compensation and Bonuses

In his first year as Assistant Service Manager at Western Peterbilt, Claimant earned a total of $51,000. TR at 65. When hired, Claimant was under the impression that the base salary was around $30,000, but with bonuses he could expect to receive more like $50,000 per year. TR at 67-68. Up to the time of hearing, Claimant's salary at Western Peterbilt had remained unchanged at $2,500 per month, or $30,000 for the year. TR at 53, 65-66. His average monthly bonuses ranged from around $1,100 to $1,800 per month, with the occasional $1,900-$2,000 month, for a total of roughly $20,000 for the year. TR at 66-67. He also receives one week of paid vacation, and he is entitled to sick leave. TR at 68-69, 79. The vacation and sick leave pay are included in his $2,500 per month salary. TR at 79-80.

Claimant has always received a monthly bonus. TR at 68. The bonus pay is based on a fixed percentage of the monthly profits of the shop. TR at 53, 66. The amounts of each bonus vary by month and by season. TR at 54. Complainant testified that the variance can be due to factors such as rising fuel costs, which make truckers less likely to do preventative maintenance and more likely to bring in their trucks only after they break down. TR at 54. According to Complainant's understanding, the bonuses are not guaranteed, even when the shop makes a profit, and are a managerial privilege that can be cancelled at any time. TR at 53-54, 81. The bonus policy is included in the employee handbook, which states, "Bonuses are optional and are paid at the discretion of WPI. Receiving a bonus is no guarantee of a future bonus." CX 7 at 184.

Claimant testified that his future bonuses may be affected because Western Peterbilt's owner is in the process of selling 80% of his 95% stock ownership in the company. TR at 54.

Claimant has not been informed of any expected raises. TR at 78. Western Peterbilt's service manager told him that the other assistant service manager who works the day shift has been with the company for five years and makes about $100 a month more than Complainant. TR at 78.

Job Leads Provided by Claimant's Employer

In the weeks or months leading up to the hearing, Respondent, by way of its attorney, provided Claimant, by way of his attorney, with a number of job leads. TR at 54-55. The leads contained a contact number and a notification that there were possible job openings at a company, but did not describe what the jobs physically required. TR at 55. Claimant followed-up with the leads by contacting the companies, which included Northland Services and a Caterpillar affiliate, and by providing them with his resume. TR at 55-56.

Northland Services informed Claimant that they did not have an available position, but were considering making one. TR at 55-56, 74. The position they were considering involved running four diesel mechanic shops which repaired tugboat engines and container generators. TR at 73. The person Claimant spoke with at Northland Services did not say whether or not he felt Claimant was qualified, but said they would let him know if they were going to create the position. TR at 74.

The Caterpillar affiliate had an assistant service manager position available, which came with a $56,100 starting salary. TR at 64-65. However, Caterpillar did not return Claimant's phone calls. TR at 64-65.

At the time of the hearing, Claimant did not have any interviews scheduled, nor did he have any outstanding offers of employment. TR at 56.

On October 31, 2005, Dr. Becker signed and indicated his approval on a document titled "Labor Market Survey," which contained Claimant's name and a job description for the position of Night Shift Supervisor at N.C. Power Systems. EX 4 at 101(a). The job functions were essentially managerial, did not require lifting more than twenty pounds, and required knowledge of CAT products, but no mechanical skills. *Id.* The pay started at $56,100 and capped at $68,500. *Id.*

Deposition of Vocational Rehab Counselor Kent Schaefer

Employer's vocational expert, Kent Schaefer, Med, CRC, CCM, a Certified Rehabilitation Counselor, provides vocational services on behalf of the OWCP and expert testimony on behalf of both injured workers and employers. ALJX 4 at 14; Shaefer Depo. Exhibit 1. He is familiar with the Seattle-Tacoma labor market. *Id.* He reviewed Claimant's resume and deposition testimony, and conducted a labor-market survey. *Id.*

He identified three tiers of jobs in the area that would be available to Claimant, including entry-level jobs paying $8-14 per hour, bench mechanic/light assembly and parts jobs paying $12-16 per hour, and service writer/shop manager jobs, which pay $55,000-60,000 annually and in which Claimant is currently employed. *Id.*

II. CONCLUSIONS OF LAW

A. Introduction

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan,* 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

It is undisputed that the Act applies, and that on May 9, 2003, Claimant suffered a work-related injury arising out of and in the course of his employment with Employer when he fell ten feet from the upper level of the Coast Guard ship he was working on. TR 17-18, 36-37. It is undisputed that the fall injured Claimant's left arm. TR at 18. It is also undisputed that Claimant reached maximum medical improvement on May 11, 2004, and that he received temporary total disability benefits up to that date. TR at 18. Further, it is undisputed that, following the date of maximum medical improvement, Claimant was entitled to and did receive from Employer a scheduled, five percent permanent partial disability award under Section 8(c)(1) of the Act for the injury to his left arm. TR at 18. Finally, it is undisputed that Claimant has been engaged in alternative employment since September 13, 2004. *Id.*

Claimant argues that, in addition to the scheduled award he has already received for the left arm injury, he is also entitled to a separate, unscheduled award under Section 8(c)(21) of the Act for a left shoulder injury, which he claims to have suffered as a result of the same fall. *See* ALJX 3. Claimant argues that the left shoulder is impaired, has itself caused him physical work limitations that prevent him from returning to his job of injury, and therefore entitles him to an unscheduled award. ALJX 3 at 13-14.

Employer challenges Claimant's entitlement to any award for his left shoulder, arguing: (1) that Claimant did not suffer a permanent injury to his left shoulder as a result of the fall, (2) that any symptoms in the left shoulder are a result of the injury to the left arm, which is the situs of injury, and (3) that regardless of any symptoms in the left shoulder, it has no ratable impairment and is not the cause of any work restrictions, which stem from the left shoulder only. *See* ALJX 4.

I found the Claimant to be very credible in his testimony that he has experienced and continues to experience pain in his left shoulder. I reject his unqualified testimony, however, that his left shoulder injury alone causes him increased restrictions and physical limitations that prevent him from performing his former job as a diesel mechanic because Claimant is not a trained physician, disability analyst, or forensic examiner.

B. Claimant's Entitlement to Compensation for His Left Shoulder

The Longshore and Harbor Workers' Compensation Act entitles a covered employee to receive compensation from their employer when they become disabled as a result of an accidental injury that arises out of and in the course of employment. *See* 33.U.S.C. §§ 903(a) and 902(2).

If a claimant suffers two distinct injuries arising from a single work-related accident, one scheduled and one unscheduled, he may be entitled to receive compensation for both injuries. *Green v. I.T.O. Corporation of Baltimore*, 32 BRBS 67 (1998), *citing Frye v. Potomac Electric Power Co.*, 21 BRBS 194, 198 (1988) ("When a claimant suffers two distinct injuries arising from a single accident, one compensable under the schedule and one compensable under Section 8(c)(21), he may be entitled to receive compensation under both the schedule and Section 8(c)(21).").

Although the arm is covered by the schedule at Section 8(c)(1), the shoulder is classified as an unscheduled injury under Section 8(c)(21). *See e.g., Barker v. U.S. Department of Labor*, 138 F.3d 431, 32 BRBS 171, 174 (1st Cir. 1998); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1982).

Proof of two distinct work-related injuries alone does not entitle a claimant to benefits for each injury— a claimant must also show that each work-related injury independently caused him or her to be disabled within the meaning of the Act. *See* 33 U.S.C. 903(3); *Green,* 32 BRBS 67; *Devine*, 25 BRBS 15 at 19; *see also Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981) ("[A] work-related injury comprised of symptoms alone is compensable only to the extent that the injury causes disability.") (internal citations omitted).

If, on the other hand, a claimant suffers only one injury as a result of a work-related accident, but the natural progression of that injury causes a second injury to a different body part, the "situs of injury" rule may apply and limit the claimant to a single award, depending on whether the initial injury is scheduled or unscheduled. According to the rule, if the original work-related accident causes injury to a *non-scheduled* body part, which in turn causes a separate injury to a scheduled body part, the claimant is limited to recovery under the non-scheduled formula of Section 8(c)(21), and may not receive separate compensation under the schedule for the resultant injury to the scheduled body part. *See Keenan v. Director for the Benefits Review Board*, 392 F.3d 1041 (9th Cir. 2004), *referencing Long v. Director, OWCP*, 767 F.2d 1578 (9th Cir. 1985); *Pool Co. v. Director, OWCP*, 206 F.3d 543, 34 BRBS 19(CRT) (5 th Cir.), *reh'g denied*, 232 F.3d 212 (5 th Cir. 2000); *Grimes,* 14 BRBS 573; *Barker v. United States Dep't of Labor*, 138 F.3d 431, 434-35 (1st Cir. 1998) (holding that an injury to a body part not included in the schedule must be compensated as an unscheduled injury, no matter if the symptoms extend beyond the injured area into a scheduled body part).

By contrast, if the original work-related accident causes injury to a *scheduled* body part, the natural progression of which causes a separate injury to an unscheduled body part, "the claimant is not limited to a single award for the combined effect of his conditions, but may

receive a separate award under Section 8(c)(21) for the consequential injury, in addition to the award for the initial injury." *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994) (overruling *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988), to the extent it limited claimant to one award for the combined effects of such an injury).

Employer missed this important distinction in relying on *Potomac Electric Power Company v. Director, Office of Worker's Compensation Programs* ("PEPCO") and *Long v. Director, Office of Worker's Compensation Programs* ("Long"). *See* ALJX 4 at 2-3; *See also Pepco*, 449 U.S. 268 (1980) and *Long*, 767 F.2d 1578 (9th Cir. 1985). In *PEPCO*, the Claimant suffered a scheduled injury to his knee, but sought unscheduled benefits instead of benefits pursuant to the schedule, which would have entitled him to a significantly larger award. 449 U.S. at 273-75. The Supreme Court reversed the decisions of the ALJ, the Board, and the D.C. Circuit Court of Appeals, and held that when a single injury is specified in the schedule, a successful claimant is limited to benefits pursuant to the schedule, and cannot opt to receive unscheduled benefits pursuant to Section 8(c)(21), even if it would provide greater recovery. *Id*. In applying *PEPCO*, the Board in *Long* held that when an employee sustains an injury to an *unscheduled* body part, the progression of which causes injury to a *scheduled* body part, he is limited to unscheduled benefits pursuant to Section 21(8)(c), and cannot recover benefits under the schedule for the subsequent harm to a scheduled body part. 767 F. 2d at 1581-82.

Employer argues that Claimant's *scheduled* injury to his left arm has caused an *unscheduled* injury to his left shoulder, which it acknowledges is factually converse to the situation in *Long*. *See* ALJX 4 at 3. This distinction is critical, as pointed out by the Board in *Bass*. *See* 28 BRBS 11. In *Bass*, the claimant argued that a scheduled injury to his knee had subsequently caused an unscheduled injury to his back, and that he was therefore entitled to unscheduled benefits pursuant to Section 8(c)(21), in addition to the scheduled benefits he had received for the injury to his knee. *Id.* As discussed above, the Board in *Bass* held that when a *scheduled* injury causes injury to an *unscheduled* body part, which is what Employer argues here, the claimant *may* receive additional compensation for the unscheduled injury pursuant to Section 8(c)(21). *Id.* In so concluding, the Board reversed the ALJ's holding that, pursuant to *PEPCO*, the claimant was limited to a scheduled award. *Id. See Bass*, 28 BRBS 11.

As such, in order to determine whether Claimant is entitled to compensation for his alleged injury to his left shoulder, I must decide two principal issues: (1) whether Claimant suffered an injury to his left shoulder, either as a result of his work-related accident of May 9, 2003, or as a result of the natural progression of the injury to his left arm which resulted from the accident, and (2) if so, whether the left shoulder injury independently caused him to be permanently partially disabled within the meaning of Section 8(c)(21) of the Act.

1. The Existence of a Distinct Left Shoulder Injury

Under the Act, the term "injury" includes accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2). Section 20(a) of the Act creates a presumption on behalf of claimants, providing that "it shall be presumed, in the absence of substantial evidence to the contrary . . . (a) that the claim comes within the provisions of the Act." The Claimant has the burden of invoking the presumption by establishing a *prima facie* case that he suffered some

harm or pain, and that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kalaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).

A claimant need only present some evidence tending to establish those prerequisites; there is no "preponderance of the evidence" requirement, nor must a claimant present medical evidence of a causal relationship between the working conditions and the harm. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990), *see also Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15, 20 (1990). Medical evidence establishing a causal relationship between the working conditions and the harm is not required. A claimant's credible complaints of subjective symptoms and pain are sufficient to establish the existence of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom.*, *Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

Once invoked, the Section 20(a) presumption applies unless the Employer rebuts the presumption by producing substantial evidence that the injury or harm was not caused by or related to Claimant's employment. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (11th Cir. 1990); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). A physician's unequivocal statement, to a reasonable degree of medical certainty, that the harm is not related to the employment, is sufficient to rebut the 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

After careful review of the evidence, I conclude that Claimant suffered a distinct injury to his left shoulder as a result of his work-related fall on May 9, 2003, and further note that any portion of the injury to his left shoulder that was not caused by the fall was the result of the natural progression of the injury to his left arm. TR at 70; Hanel Depo. at 10, 11, 23, 24; EX 6 at 103(a)(both of them); and Kirby Depo. at 39-40.

a. Claimant Has Met His *Prima Facie* Burden to Invoke Section 20(a)

Claimant has made out a *prima facie* case that he suffered a work-related injury to his left shoulder by demonstrating that it caused him to suffer harm and pain that actually increased through periods of his treatment, and that his workplace fall on May 9, 2003, was the most likely cause of the harm and pain. *See Kalaita*, 13 BRBS 326; *Murphy*, 7 BRBS 309, *aff'd mem.*, 600 F.2d 280.

Claimant repeatedly and credibly testified that, from the day of the accident up to today, he has felt varying degrees of pain in his left shoulder, ranging from a level of three to five on a scale of ten when stationary, up to six to eight out of ten when working. He testified that his left shoulder pain would prevent him from sleeping, lifting, and other functions. *See, e.g.*, CX 2 at 37-38; EX 1 at 14-15.

Though Claimant's early surgeries and treatment focused on the left arm and did not specifically indicate a problem with the left shoulder, soon thereafter it became clear that his left shoulder had also been injured.

First, his claims of left shoulder harm and pain are supported by reports of his early physical therapist, Mr. Billingsley, M.P.T., who found twenty degrees less shoulder flexion and five degrees less external rotation in Claimant's left shoulder, as compared to his right. CX 3 at 49. Mr. Billingsley placed him on a physical therapy regimen consisting of stretching, lifting, and electro-therapy and included his left shoulder. TR at 41, 46, 83-84; CX 3 at 50-62. Mr. Billingsley noted that Claimant attended regularly until October 6, 2003, and appeared motivated to return to work. CX 3 at 50-57. Claimant testified that his left shoulder hurt as soon as therapy began, but that he and his therapist assumed the pain was normal, given the severity of the fall and limited use of his left arm since the accident, and would eventually subside. TR at 42.

Second, Claimant's complaints of left shoulder pain are consistent with the opinion of Dr. Hanel, Claimant's treating physician. Dr. Hanel testified that Claimant's May 9, 2003 accident separately and simultaneously caused injury to both Claimant's left arm *and* his left shoulder. Hanel Depo. at 23. When Dr. Hanel first treated Claimant on November 17, 2003, he noted that Claimant experienced left shoulder pain with forward flexion, abduction, and external rotation, and had an abnormal range of motion in the left shoulder. *Id.* at 8; CX 2 at 19; EX 1 at 10. Dr. Hanel concluded that the shoulder joint was stable and free of crepitus, and included in his recommendation aggressive strengthening of the left shoulder, believing that with aggressive therapy and a willingness to work through the pain, Claimant's left arm strength would return and he would be able to return to work. *Id.*

At his follow-up visit to Dr. Hanel's office on March 8, 2004, Claimant complained that his left shoulder and arm pain was interfering with his sleep and other functions. TR at 44; CX 2 at 31; EX 1 at 12. Dr. Hanel's objective physical examination of Claimant revealed a painful, yet fairly full range of motion in Claimant's left shoulder, a palpable defect and tenderness in Claimant's left supraspinatus in his rotator cuff (which does not necessarily indicate abnormality), and a positive impingement sign in his left shoulder, which causes pain when the shoulder moves forward and collides with the scapula or shoulder blade. CX 2 at 31; EX 1 at 12; Hanel Depo. at 13; Kirby Depo. at 26. Dr. Hanel and the participating Dr. Robertson concluded Claimant suffered from rotator tendinopathy and a likely tear in his left shoulder, and ordered a number of MRIs of the left shoulder. CX 2 at 31; EX 1 at 12; Hanel Depo. at 14.

Claimant returned to Dr. Hanel's office on April 19, 2004, where he had a number of MRIs taken of his left shoulder. CX 2 at 35-37; EX 1 at 14-20. According to the attending doctor and radiologist, the MRIs revealed small cysts in the left shoulder at the insertion of the rotator cuff and a mild impingement of the supraspinatus tendon of the left shoulder, but no tear. *Id.* Dr. Parisi also noted the MRIs revealed thickening of the supraspinatus tendon, but no tear. CX 2 at 37-38; EX 1 at 14-15; Hanel Depo. at 16. Dr. Parisi physically examined Claimant following the MRI, and concluded Claimant had a painful but full range of motion in his left shoulder, and a positive impingement sign in his left shoulder under both the Neer and Hawkins tests for shoulder impingement. CX 2 at 37-38; EX 1 at 14-15. Dr. Parisi reviewed Claimant's x-rays of May 9, 2003 and his MRIs from earlier in the day and, when coupled with her physical examination, concluded that Claimant suffered a subacromial, or rotator cuff, impingement of his left shoulder, but no tear. *Id.*

Dr. Parisi suggested that in order to achieve the goal of returning Claimant to work, his left shoulder pain must be improved so that he could continue physical therapy on his distal biceps. CX 2 at 37-38; EX 1 at 14-15. Dr. Parisi noted that if Claimant could show relief of his impingement symptoms, he could proceed with aggressive physical therapy to rehabilitate his left distal biceps. *Id.* To help with the pain, Claimant received a steroid injection in the subacromial space between his left shoulder blade and collarbone, but Claimant testified it only relieved his pain for an hour or two. CX 2 at 37-38; EX 1 at 14-15; Hanel Depo. at 16; TR at 45-46.

In Dr. Hanel's final report dated June 7, 2004, he concluded that although Claimant continued to suffer pain in the left shoulder, it was stable and there was nothing mechanically that could or should be done for it, making surgery and further visits to Dr. Hanel unnecessary. CX 2 at 40; EX 1 at 21. Dr. Hanel instructed Claimant to follow through with the recommendations of Dr. Becker, Dr. Kirby, and his vocational rehabilitation counselors. *Id.*.

Third, Claimant's claims of shoulder harm and pain are also supported by evidence stemming from his participation in physical therapy and a work hardening program which he began around October 8, 2003. TR at 41; CX 2 at 19; EX 1 at 9. Claimant participated in graduated weight handling, work simulation, and instruction in body mechanics and posture five days a week, starting with two to four hour a day and building up to six to eight hours a day, through Capen Industrial Rehabilitation Services. TR at 41; CX 4 at 63-65. His physical therapists noted his high motivation and continued improvement in strength in his left arm and shoulder, but noted that his complaints of pain in his left shoulder and rotator cuff continued and in fact worsened as the treatment intensified, causing decreased mobility in his left shoulder. CX 4 at 70-83.

However, Claimant felt the need to return to Dr. Hanel's office on January 24, 2005 due to his continued shoulder pain and a red streak that would appear on his left arm when exerted. CX 2 at 42-43. Dr. Hanel and Dr. Nicandri physically examined Claimant, and found in the left shoulder a continued subacromial impingement, a palpable tendon snap, and a thickened biceps tendon. *Id.* and Hanel Depo. at 20. They reaffirmed their belief that it was unlikely that any surgical options could relieve his left shoulder pain, and instructed Claimant to continue working on its range of motion, as tolerated. *Id.* Claimant testified that after he started the more aggressive treatment, his left shoulder felt as though someone were driving an ice pick from the front of his shoulder through the back. TR at 44.

Finally, Employer's witnesses both acknowledge that Claimant has suffered left shoulder pain. Employer's independent medical examiner, Dr. Kirby, reviewed Dr. Hanel's records and deposition, and agreed that Claimant's left shoulder was symptomatic and painful, and that some harm probably occurred to Claimant's left shoulder as a result of the fall. Kirby Depo. at 37-40. However, Dr. Kirby did not believe it was reasonable to expect that the pain would cause some restricted range of motion in the shoulder. Kirby Depo at 39-40. Additionally, Dr. Becker, who conducted a physical capacity evaluation, found with respect to Claimant's shoulder that "[e]levation for glenohumeral 'snubbing' shows a restriction of the position in the left shoulder, as identified in figure 2B. The 'depth' of the glenohumeral superficial skin dimple reveals that the mechanism of rotation and elevation at the left shoulder has restricted internal

biomechanics." *Id.* at 44. This finding is not explained, and when asked on cross-examination what he thought Dr. Becker meant, Dr. Kirby had no idea. Kirby Depo. at 43. Nevertheless, it seems to acknowledge some degree of harm to the left shoulder.

I find that Claimant's subjective complaints of left shoulder pain, which are bolstered by objective medical evidence from his treating physicians, physical therapists, MRIs and x-rays which confirm that he has and continues to suffer from left shoulder pain, and that he likely has rotator tendinopathy and a subacromial impingement to the left shoulder, are more than sufficient to establish the *prima facie* element of harm or pain.

Further, I find that Claimant has established the existence of a workplace accident that could have caused the harm or pain in his left shoulder. There is no dispute that on May 9, 2003, Claimant fell ten feet to the steel deck plate below from the upper level of a ship he was working on for Employer. TR at 17-18, 36-37. Claimant testified that for a split second midway through the fall, his entire body was hung up by the left armpit on what may have been an angle iron for a handrail, causing a jerk to his left shoulder and arm before he came loose and landed on his right side. *Id.*

The nature of the accident and its relation to Claimant's left shoulder demonstrates that the accident could have caused his left shoulder pain. Further, Claimant exceeded his *prima facie* burden by presenting medical testimony from Dr. Hanel, who believed that Claimant's left shoulder was "wrenched," twisted, or torqued at the time of the fall, and that the force and velocity of the fall was sufficient to cause injury to or account for the symptoms of Claimant's left shoulder. Hanel Depo. at 10-11, 24. He did not believe that the avulsion injury to Claimant's upper arm caused Claimant's left shoulder problems. *Id.* Rather, he believed that they were two separate injuries that occurred at the same time. *Id.* at 23.

I find that Claimant has more than met his burden of invoking the Section 20(a) presumption, which only requires "some" evidence tending to establish harm and causation, which need not include medical evidence establishing causation. *See Brown,*921 F.2d 289, 296 n.6; *see also Devine*, 25 BRBS at 20, and *Sylvester,* 14 BRBS at 236. He has subjectively testified that he continues to suffer left shoulder pain, and has supported his testimony with medical evidence from nearly every doctor and therapist who evaluated him. He has shown the existence of a workplace accident that surely could have caused the harm to his left shoulder, and has bolstered it with the medical opinion of Dr. Hanel, who clearly believed the fall caused a distinct injury to his left shoulder, and of Dr. Kirby, who admitted some harm to the left shoulder probably occurred as a result of the fall. Therefore, the Section 20(a) presumption applies unless Employer rebuts the presumption by producing substantial evidence that the injury or harm was not caused by or related to Claimant's employment. *See Brown,* 893 F.2d 294, 23 BRBS 22; *Swinton*, 554 F.2d 1075, 4 BRBS 466.

b. Employer Has Failed to Rebut the Section 20(a) Presumption

Having concluded that Claimant has successfully invoked the Section 20(a) presumption by showing the existence of a distinct injury to his left shoulder and a workplace accident that could have caused the harm, I must now determine whether Employer has rebutted that

presumption by producing substantial evidence that the left shoulder injury was not caused by or related to Claimant's employment. *See Brown,* 893 F.2d 294, 23 BRBS 22; *Swinton*, 554 F.2d 1075, 4 BRBS 466.

Employer relies on *Rivera v. United Masonry, Inc.* in support of its argument that Claimant should not be entitled to benefits. 24 BRBS 78 (1990), *aff'd*, 948 F.2d 4774, 25 BRBS 51 (CRT) (D.C. Cir. 1991). In *Rivera*, the claimant suffered a scheduled injury to his arm, and argued that he subsequently suffered a shoulder injury as a result of the cast and inactivity. *Id.* The Board held that substantial evidence supported the ALJ's finding that there was no compensable impairment to the shoulder, because all of the objective tests yielded normal results, and the claimant's treating physician could not explain his shoulder discomfort on an orthopedic basis. *Id.* As discussed above and below, there is objective evidence in this case explaining Claimant's shoulder pain, including x-rays and the Neer and Hawkins shoulder impingement tests, which several physicians concluded showed rotator tendinopathy and subacromial impingement of the left shoulder, making the case at bar factually distinct from *Rivera*. Further, Dr. Becker noted functional limitations to the shoulder in his physical capacity analysis. As such, I agree with Claimant that this case is distinguishable from *Rivera*.

I begin this analysis by noting that Employer's own independent medical examiner, Dr. Kirby, admitted that Claimant's left shoulder was symptomatic and painful, and that some harm probably occurred to Claimant's shoulder as a result of the fall, although he disputes that it caused any impairment. Kirby Depo. at 37-40. This works against his opinion that there was no indication of specific, objective findings of any shoulder injury in reviewing Claimant's medical records from Harborview. Kirby Depo. at 19.

Employer presented evidence seeking to discredit the multiple diagnoses of left shoulder impingement that came from several different physicians in Dr. Hanel's office. Dr. Hanel admitted at his deposition that most shoulder surgeons, including his boss and partner Dr. Rick Matsen, do not believe in the subacromial impingement diagnosis, believing it just wear and tear. Hanel Depo. at 17. And while Dr. Kirby found that Claimant's complaints of pain when Dr. Kirby pushed on an area of the rotator cuff were consistent with impingement, he did not believe that any of the objective tests he performed indicated shoulder impingement. *Id.* at 18.

I find that the dispute over the existence of any left shoulder "impingement" is immaterial. Even if the issue went for employer, it does not rebut the strong evidence that Claimant's shoulder has caused him pain, which is sufficient to invoke the Section 20(a) presumption, regardless of the presence or absence of a medical term used to describe the pain. *See Brown*, 921 F.2d at 296 n.6; *Devine*, 25 BRBS at 20. Nor does it serve to sever the causal relationship between the injury and the workplace accident, which an employer must do in order to rebut the Section 20(a) presumption.

As such, Employer has not presented a physician's unequivocal statement, to a reasonable degree of medical certainty, that the harm is not related to the employment, nor any other substantial evidence sufficient to rebut the Section 20(a) presumption. *See O'Kelley*, 34 BRBS 39. Therefore, the Section 20(a) presumption that Claimant suffered an injury arising out of and in the course of his employment stands.

c. The "Situs of Injury" Rule Does Not Apply

Employer further argues that any injury to Claimant's left shoulder was caused by the injury to his left arm, and not the accident itself, and thus the "situs of injury" rule limits Claimant's recovery to the scheduled injury to his left arm. *See* ALJX 4. As discussed above, I have found that Claimant's left shoulder injury was caused by his work-related accident on May 9, 2004, making the rule inapplicable.

However, even if the shoulder injury would have resulted from the left arm injury, the "situs of injury" rule would not preclude Claimant from recovering unscheduled benefits under Section 8(c)(21), in addition to the scheduled benefits he has already received under Section 8(c)(1). As discussed above, the "situs of injury" rule only limits a Claimant to unscheduled benefits when the initial injury is to an unscheduled body part, and that initial injury subsequently causes an additional injury to a scheduled body part. *See Keenan*, 392 F.3d 1041; *Pool Co.*, 206 F.3d 543, 34 BRBS 19; *Grimes,* 14 BRBS 573; *Barker v. United States Dep't of Labor*, 138 F.3d at 434-35.

Conversely, when the initial injury is to a scheduled body part, and that initial injury subsequently results in an additional injury to an unscheduled body part, "the claimant is not limited to a single award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury, in addition to the award for the initial injury." *See Bass*, 28 BRBS 11.

Thus, under *Bass*, even if I had not concluded that Claimant suffered a distinct injury to his left shoulder as a result of his May 9, 2003 workplace fall, separate and apart from the injury to his left arm, and instead agreed with Employer that any injury to Claimant's left shoulder was caused by the left arm injury itself, Claimant would still be permitted to recover additional unscheduled benefits under Section 8(c)(21) for the injury to his left shoulder, provided he is able to prove that it caused him to be "disabled" within the meaning of the Act. *See* 28 BRBS 11. As discussed below, however, I find that he has failed to do so.

2. The Existence of a Disability Independently Caused by the Left Shoulder Injury

Having determined that Claimant suffered a distinct injury to his left shoulder as a result of the work-related accident, I must now determine whether the left shoulder injury caused him to be permanently partially disabled within the meaning of Section 8(c)(21) of the Act. *See* 33 U.S.C. 903(3); *Devine*, 25 BRBS 15 at 19; *see also Sylvester,* 14 BRBS at 236. As discussed below, I conclude that it has not.

The Act defines "disability" as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. 902(10). Section 8 identifies four different categories of disability, based on both the nature and extent of disability, and separately prescribes the methods of compensation for each. *See Steevens v. Umpqua River Navigation*, BRB Nos. 00-1027 and 00-1027A (July 17, 2001). These

include permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability. *See Id.* and 33 U.S.C. 908(a), (b), (c), and (e). Here, Claimant seeks permanent partial disability benefits for his left shoulder under Section (8)(c)(21) of the Act, which shall be the focus of my analysis. ALJX 1 at 1; ALJX 3 at 1.

Compensation for permanent partial disability is determined based on whether the injury is scheduled or unscheduled. *Steevens,* BRB Nos. 00-1027 and 00-1027A. There are twenty specific scheduled injuries, which entitle employees to receive 2/3 of their average weekly wage for the number of weeks specified by the schedule. *Id.*; 33 U.S.C. 908(c)(1)-(20). "All other cases" of permanent partial disability are unscheduled, and entitle employees to 2/3 of the difference between the employee's pre-injury average weekly wage and his or her post-injury earning capacity. *Id.*; 33 U.S.C. 908(c)(21). The loss of use of the arm is a scheduled injury, while loss of use of the shoulder is an unscheduled injury. *See* 33 U.S.C. 908(c)(1) and (21); *Steevens*, BRB Nos. 00-1027 and 00-1027A. Thus, if Claimant is to recover for the shoulder injury, he must prove he suffered an unscheduled disability under Section 8(c)(21).

There is an essential distinction between scheduled and unscheduled injuries. A claimant with a scheduled injury that precludes him or her from returning to his or her regular job is presumed to be disabled under the Act, and no proof of lost earning capacity is required to recover benefits. *Steevens,* BRB Nos. 00-1027 and 00-1027A, *citing Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993). In contrast, there is no such presumption of disability with respect to unscheduled injuries: a claimant seeking to recover for an unscheduled injury under Section 8(c)(21) must prove he suffered economic disability, which means a loss of wage earning capacity that was caused, at least in part, by that particular injury. *See Id*. (A claimant who suffers an unscheduled injury "is not disabled unless he proves incapacity because of injury to earn the wages."); *Green,* 32 BRBS 67. Further, if any loss in a claimant's earning capacity is due to a separate, scheduled injury arising from the same accident, such loss must be eliminated from the 8(c)(21) award. *Green,* 32 BRBS 67. This is in addition to the requirement under Section 8(c)(21) that a claimant first establish that he cannot return to his regular or usual employment due, at least in part, to the unscheduled injury. *Id.*

In summary, Claimant must first prove that he is unable to return to his work as a diesel mechanic due, at least in part, to his left shoulder injury. *See Green,* 32 BRBS 67. If he meets that burden, he must then prove that his left shoulder injury independently caused a loss in earning capacity, factoring out any loss attributable to his left arm injury. *See Green,* 32 BRBS 67.

After careful review of the evidence, I conclude that Claimant has failed to establish a causal connection between his left shoulder injury and his inability to return to work as a diesel mechanic. Even if Claimant's left shoulder injury itself did contribute to Claimant's inability to return to work, there is no evidence showing a causal relation between the left shoulder injury and any loss of earning capacity, especially when any loss of earning capacity due to his left arm injury is factored out.

a. Claimant Has Failed To Establish That His Left Shoulder Injury Contributed To His Inability To Return To Work As a Diesel Mechanic

It is clear from the record that Claimant's left *arm* injury prevents him from returning to work as a diesel mechanic. It is not clear, however, that his left *shoulder* injury has independently contributed to his inability to return to work. Based on the evidence set forth below, I conclude that Claimant has failed to show that his left shoulder injury has independently contributed to his inability to work as a diesel mechanic.

Claimant's strongest evidence in support of his claim is his own subjective, anecdotal testimony describing his physical limitations that he believes are caused by his left shoulder. Claimant testified that, based on the left arm and shoulder injuries *combined*, he cannot perform a number of duties specific to work as a diesel mechanic, including: (1) removing and installing truck starters, (2) removing truck tires, (3) performing overhead work with items weighing over four pounds more than briefly, (4) lifting heavy weights with his left arm straight out from his body, (5) working in odd positions around large equipment, (6) working a manual chainfall (Claimant testified that he could use an electric chainfall, but that he used a manual chainfall 99.9% of the time he worked for Employer), (7) attaching large straps from a crane to heavy equipment, and (8) lifting anything weighing more than 30-35 pounds. TR at 48. Claimant testified that he has tried to lift items weighing more than 30-35 pounds, but his left arm and shoulder do not permit it. TR at 48-49.

When asked about which specific diesel mechanic duties he believed he could not perform solely because of his shoulder injury, Claimant responded "all of it, pretty much." TR at 57-59. He noted that the work requires a lot of physical labor, lifting heavy weights, and putting one's body in awkward positions, and specifically mentioned his left shoulder injury prevented him from installing clutches and starters into trucks, which requires holding and manipulating an eighty-five pound starter overhead. TR at 59. He also testified that he probably could not operate a forklift on gravel, because the bouncing of the forklift would bother his shoulder. TR at 71. As to non-work related limitations, he testified that he can no longer hunt because the recoil of a rifle would cause pain in his left shoulder, that fishing causes pain in his left shoulder when casting, and that the swinging of his arm when he walks or hikes causes him left shoulder pain. TR at 60-61.

However, Dr. Hanel, the other doctors at Harborview, and Dr. Kirby all found that, despite the pain, Claimant had full range of motion in his left shoulder. *See*; EX 1 at 14-15; CX 2 at 31, 37-38; EX 1 at 12, 14-15; EX 4 at 28-30; Kirby Depo. at 12-15. Dr. Hanel and Dr. Kirby agreed that Claimant's left shoulder was stable, that there was nothing mechanically that should or could be done about it, and that surgery was unnecessary. CX 2 at 40; EX 1 at 21.

Further, Dr. Hanel, Claimant's treating physician, was unable to say whether he believed that any of Claimant's limitations were specifically due to the left shoulder, and explicitly deferred to the opinion of Dr. Becker. Hanel Depo. at 30, 32. Dr. Becker is not a medical doctor, but has a number of titles, including Human Performance Specialist, Certified Senior Disability Analyst and Diplomate of the American Board of Disability Analysts, and a Diplomate of the American College of Forensic Examiners, and a number of credentials, including a Ph.D., RPT,

ATC CER, CDE, CEAS, CDA. TR at 47; EX 5 at 33-101. Dr. Becker is also the therapist who conducted Claimant's physical capacity evaluation, and it is his opinion about Claimant's work restrictions stemming from the left shoulder to which Dr. Hanel deferred. TR at 47; EX 5 at 33-101; Hanel Depo. at 30, 32. As such, I admitted Dr. Becker's report and opinion over Claimant's objection that he is not qualified to give a medical opinion, noting that it was relied on by competent medical experts and that I would be able to weigh his opinion accordingly. TR at 7-9.

In the course of conducting Claimant's physical capacity evaluation, Dr. Becker assessed Claimant's physical limitations related to both work and daily activities. EX 5 at 39-46, 51-100. He did so by obtaining Claimant's background, history, and subjective complaints, and by conducting a series of strength, mobility, biomechanical function, and tolerance tests. *Id.* He observed and recorded Claimant engaging in a variety of activities, such as standing, walking, sitting, and lifting and manipulating various weights from the floor and overhead. *Id*.

With respect to Claimant's left shoulder, Dr. Becker noted in his report that, biomechanically, there was a restrictive mechanism in Claimant's left shoulder to elevation and abduction, the existence of intrinsic elevation restrictions in the left shoulder for full to overhead intact mechanics, and that strength testing in the shoulder range and below was within the "medium" range of work, while in the shoulder range and above testing was within the "light to medium" range of work. EX 5 at 45; CX 6 at 104. He also found that "[e]levation for glenohumeral 'snubbing' shows a restriction of the position in the left shoulder, as identified in figure 2B. The 'depth' of the glenohumeral superficial skin dimple reveals that the mechanism of rotation and elevation at the left shoulder has restricted internal biomechanics." *Id.* at 44. However, that particular finding is not explained, and when asked on cross-examination what he thought Dr. Becker meant by the statement, Dr. Kirby had no idea. Kirby Depo. at 43.. EX 5 at 46; CX 6 at 105.

Employer's counsel sought an explanation of those findings with respect to Claimant's shoulder, and exchanged correspondence with Dr. Becker regarding his physical capacity evaluation report of Claimant. EX 6 at 102-103(a).[2] In response to Employer's counsel's questions, Dr. Becker affirmed that he believed that Claimant's left arm was the specific locus of the injury causing any dysfunction in Claimant's left shoulder, including difficulties with overhead use and impingement, and that there was no distinct injury with a locus in the left shoulder causing its dysfunction. EX 6 at 102-103. When asked to clarify whether Dr. Becker believed that the positive shoulder impingement sign noted by medical doctors who had examined Claimant was "more probably than not caused by an injury with a locus in the arm[,] or in the shoulder," Dr. Becker opined that "the secondary effect of the [left arm] injury is dysfunction in the biomechanics of the [left] shoulder which has created a profile of clinical impingement." EX 6 at 103(a)(both of them).

Further, Dr. Kirby, Employer's independent medical examiner, who had extensive experience working with shoulders, testified that it was unreasonable to expect that Claimant's shoulder pain and symptoms would restrict its range of motion, and that he would not impose any work restrictions or functional limitations on Claimant based on his left shoulder. Kirby Depo. at 37-40. Dr. Kirby did impose on Claimant a fifty pound lifting restriction, but stated the

[2] A letter from Employer's counsel and a return letter in response from Dr. Becker are both numbered 103(a)).

restriction was due to Claimant's left *arm* injury, not the left shoulder injury. Kirby Depo. at 37-38. He acknowledged that Dr. Becker had found some shoulder restrictions in his report, but did not specify what those restrictions were, and stated he had "no idea" what Dr. Becker's notation about "glenohumeral snubbing" in reference to the left shoulder meant. *Id.* at 41-43.

I conclude that Claimant's subjective belief is outweighed by the opinions of Dr. Kirby, a medical doctor with expertise in treating and evaluating shoulders, and Dr. Becker, a biomechanical therapist and evaluator, who both concluded that, although it caused him pain, Claimant's left shoulder did not by itself cause any physical limitations or restrictions that contributed to his inability to work as a diesel mechanic. He has not proven that his left shoulder injury contributed to his inability to return to work, and therefore, pursuant to *Green*, he cannot show the shoulder caused him to be disabled within the meaning of the Act. *See Green,* 32 BRBS 67.

b. Claimant Has Failed To Establish a Causal Connection Between His Left Shoulder Injury and Any Loss in Earning Capacity

Even if Claimant had proven that the left shoulder injury contributed to his inability to return to work, he would still have to show it also caused a loss in his earning capacity. *See Green,* 32 BRBS 67. For the same reasons that the evidence has failed to show that Claimant's shoulder injury contributed to his inability to return to work, it fails to show any resultant loss in his earning capacity. Further, any actual loss in earning capacity due to his left arm injury would have to be factored out. *See Green,* 32 BRBS 67.

Based on Dr. Kirby and Dr. Becker's testimony that any work restrictions they imposed stemmed from his left arm injury, and *not* the shoulder, and because Dr. Hanel deferred to their opinions, and because I find that their opinions outweigh Claimant's subjective belief that some work restrictions are due to his left shoulder injury alone, I conclude that any loss in Claimant's earning capacity is due to his left arm, not his left shoulder. Therefore, all of Claimant's lost earning capacity would be factored out, and he would not be entitled to benefits under Section 8(c)(21) for his shoulder injury. As such, there is no need to discuss whether Claimant's actual earnings from his present alternative employment reasonably and fairly represent his post-injury earning capacity.

C. Conclusion

While Claimant has proven that he suffered an injury to his left shoulder arising out of and in the course of his employment with Employer, he has not proven that the injury contributed to his inability to return to work or to any additional loss in earning capacity. Therefore, based on the record as a whole, Claimant's left shoulder injury has not caused him to be "disabled" within the meaning of the Act, and he is not entitled to additional benefits.

Accordingly, Claimant's remaining claim for benefits is denied.

IT IS SO ORDERED.

A

GERALD M. ETCHINGHAM
Administrative Law Judge